UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Mirant Americas Energy Marketing, L.P., et al. Docket No. EL01-93-009

ORDER ON REMAND

(Issued December 23, 2003)

1. In prior orders, the Commission required certain agreements between ISO New England Inc. (ISO-NE) and various generators to be filed for informational purposes, granted waiver of the 60-day prior notice requirement, and, as a consequence of granting waiver, did not order time-value refunds.[1] This case is before the Commission on remand from the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) for further explanation of the Commission's decisions to grant waiver and not order refunds.[2] Accordingly, this order clarifies the Commission's reasons for reaching those two holdings.

[1] Mirant Americas Energy Mktg., L.P., et al. v. ISO New England Inc., 96 FERC ¶ 61,201 (August 10 Order), clarification granted and reh'g denied, 97 FERC ¶ 61,108 (October 26 Order), clarifications granted and reh'g denied, 97 FERC ¶ 61,360 (2001) (December 21 Order), clarification and reh'g denied, 99 FERC ¶ 61,003 (2003) (April 1 Order), remanded sub nom. NSTAR Elec. & Gas Corp. v. FERC, No. 02-1047, 2003 U.S. App. LEXIS 8078 (D.C. Cir. Apr. 28, 2003) (Remand Order).

[2] Remand Order, 2003 U.S. App. LEXIS 8078.

I. Background

A. Market Rule 17

2. NEPOOL's Market Rule 17 was established to provide market power monitoring and mitigation procedures for units that provide system reliability during periods when transmission is constrained.[3] Initially, under the mitigation procedures, if there was not a separate mitigation agreement between ISO-NE and a so-called out-of-merit generator (i.e., essentially a generator that must be dispatched for reliability reasons, when it would not otherwise be dispatched)[4] and the generator's bid was to be mitigated, the generator's bid was capped at a level below its actual bid.[5] However, Market Rule 17.3.3(b) authorized ISO-NE to enter into mitigation agreements with the owners of such generating units to establish a higher price to be paid to the supplier in lieu of the lower, capped bid. Specifically, it stated that the "ISO may enter into negotiation with a resource owner for any reasonable payment terms if the ISO reasonably expects the markets will function more reliably, competitively or efficiently as a result [i.e., will ensure that the generator remains available during transmission constraints]."[6]

3. On May 31, 2001, ISO-NE proposed a revised Market Rule 17 (Modified Procedures), which provided that all existing mitigation agreements would terminate on June 30, 2001.[7] The Modified Procedures also stated that generators, which want to enter into a mitigation agreement with ISO-NE, could be paid based on a rate specified in the Modified Procedures or a cost-of-service agreement to be filed with the Commission.[8]

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[3] See NSTAR Services Co. v. New England Power Pool, 92 FERC ¶ 61,065 at 61,201 (2000).

[4] In a system where generation is normally dispatched in order of economics, beginning with the lowest cost generation, an out-of-merit generator is dispatched not because it is economic to do so but for reliability reasons.

[5] See Market Rule 17.3.2.2(b).

[6] Id.

[7] See August 10 Order, 96 FERC ¶ 61,201 at 61,858 (explaining the Modified Procedures in further detail).

[8] We note that, subsequently, on July 15, 2002, NEPOOL and ISO-NE filed a proposal to replace the design of the then-existing NEPOOL markets with Market Rule 1, commonly referred to as the New England Standard Market Design (NE-SMD). See New England Power Pool and ISO New England, NEPOOL Standard Market Design,

(continued…)

B. Relevant Orders

4. The October 26 Order required the filing with the Commission of all mitigation agreements negotiated under Market Rule 17.[9] Citing Central Hudson Gas and Elec. Corp.,[10] the Commission granted ISO-NE a waiver of the 60-day prior notice requirement and directed ISO-NE to file, within 30 days of that order, any existing mitigation agreements negotiated under Market Rule 17.[11]

5. On November 26, 2001, NSTAR sought clarification that amounts collected under the mitigation agreements in excess of the Market Rule 17 default formula rates had to be refunded. Addressing that filing, the December 21 Order stated that refunds were not required with respect to mitigation agreements negotiated pursuant to Market Rule 17 because the Commission had granted waiver of the 60-day prior notice requirement in the October 26 Order.[12]

6. On January 18, 2003, the Maine Public Utilities Commission and, on January 22, 2002, Northeast Utilities Service Company and Select Energy, Inc. filed requests for rehearing of the December 21 Order, arguing that the Commission erred in denying refunds because the agreements resulted in changes to the filed rate that were not filed with the Commission. In addition, on February 5, 2002, NSTAR, which did not seek rehearing of the December 21 Order with the Commission, filed its petition for review of the August 10, October 26, and December 21 Orders with the D.C. Circuit.

7. In the April 1 Order, the Commission denied the requests for rehearing of the December 21 Order. The April 1 Order further explained that, because the 60-day prior

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Docket No. ER02-2330 (2002). The Commission approved the NE-SMD in a pair of orders issued in 2002. See New England Power Pool and ISO New England Inc., 101 FERC & 61,344 (2002); New England Power Pool and ISO New England Inc., 100 FERC & 61,287 (2002). In addition, the Commission authorized the ISO-NE to implement the SMD on March 1, 2003. New England Power Pool and ISO New England Inc., 102 FERC & 61,248 (2003) (denying stay of the NE-SMD).

[9] 97 FERC ¶ 61,108 at 61,556.

[10] 60 FERC ¶ 61,106 (Central Hudson I), reh'g denied, 61 FERC ¶ 61,089 (1992) (Central Hudson II).

[11] October 26 Order, 97 FERC ¶ 61,108 at 61,554.

[12] 97 FERC ¶ 61,360 at 62,663.

notice requirement had been waived, the contracts would not be considered to be filed late and therefore time-value refunds, which are based on a late filing, were not in order.[13]

C. Remand Order

8. On April 28, 2003, the D.C. Circuit remanded this proceeding to the Commission, explaining that:

> In Central Hudson, the Commission stated that it would generally find good cause to justify a waiver for 'filings that increase rates when the rate change and the effective date are prescribed by' a contract already on file with the Commission because, 'in [those] instances, there is a contractual commitment as to the effective date which the Commission has already accepted.' Market Rule 17 does not set forth rate changes or effective dates; instead, it permits the New England ISO to enter into mitigation contracts, the terms of which are to be determined by the New England ISO. Therefore the Commission's citation to Central Hudson neither explained, nor in itself supported, the Commission's waiver decision. As to the refusal to order refunds, the Commission offered no rationale for its decision other than that it has granted waivers to the New England ISO.[14]

II. Discussion

9. In the Remand Order, the D.C. Circuit directs the Commission to further explain: (1) its waiver of the 60-day prior notice requirement for the mitigation agreements; and (2) its related decision to not order time-value refunds as a remedy for ISO-NE's late filing of these agreements. The Commission explains in greater detail below that waiver of the 60-day prior notice requirement was properly granted and, as a result, time-value refunds are not called for.

10. We first briefly describe our prior notice policy before explaining the Commission's decision to waive the notice requirement in this matter. Pursuant to section 205 of the FPA and the Commission's implementing regulations of that statutory

[13] 99 FERC ¶ 61,003 at 61,019 n.8.

[14] Remand Order, 2003 U.S. App. LEXIS 8078, 3-4 (citations omitted).

language,[15] public utilities must file rates and charges for jurisdictional service, such as the mitigation agreements, at least 60 days in advance of the commencement of that service. However, section 205(d) also expressly confers on the Commission the discretion to grant waiver of the 60-day prior notice requirement for good cause shown and to determine the effective date of proposed rate changes.[16] If the utility files late (i.e., gives the Commission less than 60-days' notice) and the Commission does not find good cause warranting a waiver, the Commission requires it to refund to its customers the time value of the revenues collected for the entire period that the rate was collected before the agreement was made effective.[17]

11. Turning to the second issue first (i.e., the issue of time-value refunds), given the Commission's waiver of the 60-day prior notice requirement, time-value refunds are not called for. As the Commission clarified in the December 21 Order, "refunds will not be required with respect to mitigation agreements negotiated pursuant to Market Rule 17, because the Commission granted waiver . . . in the October 26 Order."[18] In other words, the Commission waived the 60-day prior notice requirement and thereby allowed the contracts to become effective as of the date agreed upon by the parties. Because the mitigation agreements were made effective as of the date the parties agreed and there was never a time the rates were charged without the Commission's authorization, time-value

[15] 16 U.S.C. § 824d (2000); 18 C.F.R. §§ 35.3, 35.11 (2003).

[16] Specifically, section 205(d) provides that: "The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published." Id.

[17] See, e.g., Prior Notice and Filing Requirements Under Part II of the Federal Power Act, 64 FERC ¶ 61,139 at 61,975, clarified, 65 FERC ¶ 61,081 (1993) ("If a utility files an otherwise just and reasonable cost-based rate after new service has commenced, or if waiver is denied and the proposed rate goes into effect after service has commenced, we will require the utility to refund to its customers the time value of the revenues collected . . . for the entire period that the rate was collected without Commission authorization."); Montana-Dakota Utilities Company, 81 FERC ¶ 61,298 at 62,407 (1997); accord El Paso Electric Company, 105 FERC ¶ 61,131 at P 21 (2003).

[18] 97 FERC ¶ 61,360 at 62,666; see also Carolina Power & Light Company, 84 FERC ¶ 61,103 at 61,522 (1998) (explaining that a time-value refund computes a refund that is directly proportionate to the amount of money billed without authorization and the length of time such revenues were collected without Commission authorization), order on reh'g, 87 FERC ¶ 61,083 (1999).

refunds were not called for. As the April 1 Order explained, "because of the Commission's waiver of the 60-day prior notice in the October 26 Order, the mitigation agreements would not be considered to be filed late and therefore there would be no time-value refunds due to [ISO-NE's] late filing."[19]

12. Next we turn to the first issue: the Commission's rationale for granting waiver in this matter. The Commission clarified the standards it applies to waiver requests for various categories of section 205 filings in Central Hudson I and II and discussed various situations in which the Commission would find good cause for waiver of the 60-day prior notice requirement. The Remand Order discusses one of these situations outlined in Central Hudson I.[20] As the Remand Order correctly states, the Commission explained in Central Hudson I that it would "'generally find good cause to justify a waiver for 'filings that increase rates when the rate change and the effective date are prescribed by' a contract already on file with the Commission because, 'in [those] instances, there is a contractual commitment as to the effective date which the Commission has already accepted.'"[21]

13. That situation, although one of the situations identified in Central Hudson I, was not the basis for the Commission granting waiver in this case.[22] In this regard, in Central Hudson I and II, the Commission stated that in "extraordinary circumstances," it would grant waiver of the 60-day prior notice requirement when agreements are filed on or after the day service has commenced under those agreements.[23]

14. Applying that standard to this case, we found, and find again, that extraordinary circumstances are present here that justified the Commission concluding in the October 26 Order that good cause was met for granting waiver of the 60-day prior notice requirement with respect to the mitigation agreements. First, the mitigation agreements

[19] 99 FERC ¶ 61,003 at 61,019. The April 1 Order, although not under review, is part of the same docket and helps to explain the Commission's decision in this matter.

[20] 60 FERC ¶ 61,106 at 61,337, 61,339.

[21] Remand Order, 2003 U.S. App. LEXIS 8078, 4 (quoting Central Hudson I, 60 FERC ¶ 61,106 at 61,338).

[22] We recognize that the Commission could have been clearer in the October 26 Order concerning the particular situation outlined in Central Hudson I and II that the Commission was analogizing this matter to.

[23] See Central Hudson I, 60 FERC ¶ 61,106 at 61,339; Central Hudson II, 61 FERC ¶ 61,089.

are designed to allow a generator needed to assure system reliability and security to run, and yet still mitigate, pursuant to Market Rule 17, the potential exercise of market power by that generator during periods of transmission constraints.[24] Because these agreements are for critical services, under Market Rule 17, ISO-NE is authorized to enter into a mitigation agreement with a generator for "any reasonable payment terms" to ensure both that the generator remains available during transmission constraints and that customers are protected from an exercise of market power.[25] Absent the mitigation agreements (and the prices allowed in the agreements) there would be little incentive for generators to continue to make their generation available to supply services needed for system reliability and security and thus provide a needed benefit to the entire market and electricity customers.

15. In addition, under Market Rule 17, mitigation agreements are normally, but not always, negotiated prospectively.[26] Indeed, a generator may only learn on very short notice (i.e., without sufficient advance notice to negotiate and file a mitigation agreement) that it is being dispatched out-of-merit order for system reliability and security and that its bid is being mitigated. Thus, the mitigation agreements by their very nature do not always lend themselves to being filed 60 days before service commences.

16. On this basis, we find that good cause was met in this matter for granting waiver of the 60-day prior notice requirement.

III. Notice to Mirant

17. On September 12, 2003, the Bankruptcy Court for the Northern District of Texas issued a "Temporary Restraining Order Against the Federal Energy Regulatory Commission" (TRO),[27] which enjoins the Commission "from taking any action, directly or indirectly, to require or coerce the [Mirant] Debtors to abide by the terms of any Wholesale Contract [to which a Mirant Debtor is a party] which Debtors are substantially performing or which Debtors are not performing pursuant to an order of the Court unless [the Commission] shall have provided the Debtors with ten (10) days' written notice

[24] A generator that must be run during transmission constraints to provide system reliability is sometimes referred to as a reliability must-run generator.

[25] See Market Rule 17.3.3.

[26] See Market Rules 17.3.2.2(b), 17.3.3.

[27] In re Mirant Corp. (Mirant Corp. v. FERC), Adversary Proceeding No. 03-4355 (Bankr. N.D.T. Sep. 12, 2003).

setting forth in detail the action which [the Commission] seeks to take with respect to any Wholesale Contract which is the subject of this paragraph."

18. Should the TRO be converted into a preliminary injunction, an action that the Commission opposes, the Commission will appeal that order. Despite the Commission's disagreement with the validity of the TRO and its expectation that the TRO (or a preliminary injunction) will be vacated on appeal, the Commission must comply with it until vacated. The TRO requires ten days' written notice before the Commission takes a proscribed action with respect to a covered Mirant Wholesale Contract. Accordingly, to the extent that this order requires Mirant to act in a manner proscribed by the TRO, the order provides written notice to Mirant of the action that the Commission will take with respect to a covered Mirant Wholesale Contract, which action will not become effective until ten days after issuance of this order. In all other respects, this order is effective immediately.

The Commission orders:

(A) The Commission hereby finds that it permissibly waived the 60-day prior notice requirement and, as a consequence, declined to order time-value refunds, as discussed in the body of this order.

(B) Mirant is hereby given notice of the action that the Commission is taking with respect to a covered Mirant Wholesale Contract, which action will not become effective until ten days after issuance of this order, as discussed in the body of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.